

FILED
STATE OF SOUTH CAROLINA GWEN T. HYATT
IN THE COURT OF COMMON PLEAS
COUNTY OF DILLON 2015 OCT 12 AM 9:38

Guess Farm Equipment Company, Inc., d/b/a Guess Irrigation Company, Civil Action No. 2011-CP-17-00413
vs.

Justice Family Farms, LLC, and
Catfish Bay, LLC,
Defendants.

)
Plaintiff,) PLAINTIFF'S REPLY TO
) DEFENDANTS' OBJECTION TO
) MOTION FOR AWARD OF
) ATTORNEY'S FEES, COSTS,
) LITIGATION EXPENSES,
) AND INTEREST
)
Defendants.)

The Plaintiff, Guess Farm Equipment Company, Inc., d/b/a Guess Irrigation Company ("Guess Irrigation"), through its undersigned counsel, hereby submits this Reply to the Defendants' Objection to the Plaintiff's Motion for Award of Attorney's Fees, Costs, Litigation Expenses, and Interest.

ARGUMENT

I. Introduction

In the Introduction to their Objection, the Defendants claim some of the fees, costs, and litigation expenses sought are not related to the causes of action submitted to the jury, and that portion should be disallowed. Though some of Guess Irrigation's original causes of action were dismissed, all causes of action originated from a common core—the Defendants' failure to pay Guess Irrigation what was owed. The Defendants cannot dispute the complexity of this case. Many hours of work were required to address elements, facts, and causes of action that were inextricably tied together. While several causes of action were dismissed by settlement,

agreement, or order of the court, those causes of action presented issues that overlapped those in the breach of contract/mechanic's lien claims. They were essential to the prosecution of the claims that did survive and are, therefore, properly awardable.

The Defendants also emphasize the attorneys' fees sought are more than three times the Plaintiff's verdict. This fact is immaterial. Guess Irrigation sought and received a jury verdict that was fair and reflected the just compensation it was owed. The amount of the fees is partially a testament to the difficulties and obstacles presented by the Defendants, including their multiple changes in counsel, their several extensions of discovery deadlines, the drastic changes in their legal theories and claimed defenses, the need for motions to compel, and the extensive discovery they conducted. *See Spriggs Grp., P.C. v. Slivka*, No. 2013-UP-497, 2013 WL 10343401(S.C. Ct. App. Feb. 6, 2013) (recognizing that the circuit court observed considerably more time and effort was expended due to the defendant's specific actions, which created unnecessary delays and forced the plaintiff to incur additional attorney's fees and costs above and beyond what would otherwise have been incurred).

II. Attorney's Fees under S.C. Code §29-5-10

The Defendants claim that that any award of costs and fees under Section 29-5-10 must be against Catfish Bay, LLC as the owner of the real estate. No authority is cited for this statement and it is contrary to the fundamental purpose of the Mechanic's Lien Act.

A mechanic's lien cannot exist without a valid underlying debt. *See Glidden Coatings & Resins, Div. of SCM Corp. v. Suitt Construction Co., Inc.*, 290 S.C. 240, 349 S.E.2d 89 (Ct. App. 1986). In this case, the debt is Justice Family Farms, LLC's obligation to pay Guess Irrigation for the work under the parties' contract. The labor, materials, and other services

provided give rise to a mechanic's lien, which arises inchoate under Section 21-5-10 when the labor is performed or the materials are furnished. Shelly Const. Co., Inc. v. Sea Garden Homes, Inc., 287 S.C. 24, 336 S.E.2d 488 (Ct. App. 1985). That lien, when properly perfected, attaches to an owner's interest in land "to secure the payment of the debt due . . ." See Section 29-5-10. Thus, the debt in this case is a debt owed by Justice Family Farms, but one that is enforceable against Catfish Bay, LLC's interest in the structure and lot of land because of the Mechanic's Lien Act.

The court previously ruled on summary judgment that Guess Irrigation's lien was valid subject only to proof of a valid debt. That remaining element was conclusively established by the jury's verdict. Thus, contrary to the Defendants' assertion, the mechanic's lien claim is properly asserted and awarded against both Defendants, with Catfish Bay liable as the owner of the property securing payment of the debt. In other words, the lien is a claim against the contracting party, Justice family Farms, LLC (whether or not the contracting party is the property owner), which carries with it the special enforcement mechanism of foreclosure against the property of the owner, Catfish Bay, LLC.

Guess Irrigation conceded in its Motion that under Section 29-5-10, the award of attorney's fees cannot exceed the lien amount. \$144,016.00 of the attorney's fee award may be allocated under S.C. Code Ann. §29-5-10, with the remainder coming from S.C. Code Ann. §27-1-15, which as discussed below has no cap.

III. Attorneys' Fees under S. C. Code §27-1-15

The Defendants maintain an award under Section 27-1-15 can only be against the contracting party, which in this case was Justice Family Farms, LLC. However, a plain reading of Section 27-1-15 reveals no such limitation.

Whenever a contractor, laborer, design professional, or materials supplier has expended labor, services, or materials under contract for the improvement of real property, and where due and just demand has been made by certified or registered mail for payment for the labor, services, or materials under the terms of any regulation, undertaking, or statute, it is the duty of the person upon whom the claim is made to make a reasonable and fair investigation of the merits of the claim and to pay it, or whatever portion of it is determined as valid, within forty-five days from the date of mailing the demand. If the person fails to make a fair investigation or otherwise unreasonably refuses to pay the claim or proper portion, he is liable for reasonable attorney's fees and interest at the judgment rate from the date of the demand.

The "person upon whom the claim is made" can be anyone subject to the claim "under the terms of any regulation, undertaking, or statute . . ." (emphasis added). The reference to a statute clearly encompasses any claim made pursuant to the Mechanic's Lien Act. However, Guess Irrigation concedes that its Section 27-1-15 claim was directed to Justice Family Farms, LLC, the contracting party. *See Plaintiff's Trial Exhibit 89.*

IV. Reasonableness/Allocation of Attorneys' Fees

The total award of attorney's fees, costs, and litigation expenses sought by the Plaintiff is Four Hundred Ninety-four Thousand, Nine Hundred Thirty-four and 54/100 Dollars (\$494,934.54). This amount includes the total fees, costs, and litigation expenses expended by Barnes, Alford, Stork & Johnson, LLP (\$232,049.94), and Haynsworth Sinkler Boyd, P.A. (\$262,884.60). These fees, costs, and litigation expenses are itemized in and supported by the Affidavits of Robert T. Strickland and Robert W. Buffington filed contemporaneously with the

Plaintiff's Motion. While this number appears high at first glance, a review of the history and background of this complex litigation, combined with the detailed supporting documents submitted by Guess Irrigation in support of its Motion, provide ample support for its reasonableness.

Guess Irrigation agrees the court should distinguish the amount of fees awarded under each statute. *See Spriggs Grp., P.C. v. Slivka*, No. 2013-UP-497, 2013 WL 10343401 (S.C. Ct. App. Feb. 6, 2013) (remand required for circuit court to reconsider its award of attorney's fees to clearly identify the statutory authority for its award between enforcing the mechanic's lien and defendant's failure to make a fair investigation and/or timely payment). Furthermore, it is plainly obvious that the Affidavits of Robert T. Strickland and Robert W. Buffington address the six factors discussed in *Jackson v. Speed*, 326 S.C. 289, 486 S.E.2d 750 (1997), and establish that an award of attorney's fees, litigation expenses, and costs in the amount sought is reasonable and appropriate in this case.

Guess Irrigation is not seeking a double recovery on its claim for attorney's fees. While attorney's fees are recoverable under both the Mechanic's Lien Act and Section 27-1-15, fees under the Mechanic's Lien Act are capped at the amount of the lien. Guess Irrigation thus has two bases for recovering the first \$144,016.00 in attorney's fees, costs, and litigation expenses against both Defendants, with Section 27-1-15 providing the basis for awarding the balance against Justice Family Farms, LLC.

South Carolina case law provides little to no guidance on what specific materials a party should submit to support its claim for attorney's fees and litigation expenses. The evidence need only satisfy the six factors discussed in *Jackson*. In *Blumberg v. Nealco, Inc.*, 307 S.C. 537, 416 S.E.2d 211 (Ct. App. 1992), *opinion modified on denial of reh'g*, (Apr. 8, 1992) and *cert.*

granted, (Aug. 31, 1992) and *decision aff'd as modified*, 310 S.C. 492, 427 S.E.2d 659 (1993), the Court of Appeals reversed an award of attorney's fees because, although there was proof of entitlement to an award, there was no evidence presented on the amount of attorney's fees incurred or the other factors relevant to setting the amount of attorney's fees to be awarded. The Supreme Court subsequently reversed the Court of Appeals on this issue by affirming as modified. Blumberg v. Nealco, Inc., 310 S.C. 492, 427 S.E.2d 659 (1993). The Supreme Court noted there was no dispute about entitlement, and it also observed that the only evidence of attorney's fees was testimony from one of the plaintiffs that they were seeking recovery of reasonable fees. Rejecting an argument that the plaintiffs should not be allowed to "reopen" their case on attorney's fees upon remand to submit proof of the relevant factors, the Supreme Court found:

When an award of attorney's fees is requested and authorized by contract or statute, the court should make specific findings of fact on the record for each factor set forth in [Collins v. Collins, 239 S.C. 170, 122 S.E.2d 1 (1961)]. On appeal, absent sufficient evidentiary support on the record for each factor, the award should be reversed and the issue remanded for the trial court to make specific findings of fact. The Court of Appeals should have remanded the issue of attorney's fees.

Id. at 494, 427 SE 2d at 661. When the Court of Appeals considered Blumberg, it stated it was error to award plaintiff \$5,000 in attorney fees based on the amount of work expended, standing of counsel in the community, and complexity of the matter, where there were no time records, invoices or other documentation to justify the award; moreover, there was no evidence introduced to show that plaintiff actually incurred the costs, that he paid any costs or expected to be billed in the future. 307 S.C. at 538-39, 416 S.E.2d at 212. That is clearly not the case in this matter, as evidenced by the extensive materials submitted with Guess Irrigation's Motion.

Counsel for Guess Irrigation has provided detailed financial, billing, and time documentation justifying the award. Again, in awarding a reasonable attorney's fee, there are six factors to be considered: (1) the nature, extent, and difficulty of the legal services rendered, (2) the time and labor necessarily devoted to the case, (3) the professional standing of counsel, (4) the contingency of compensation, (5) the fee customarily charged in the locality for similar legal services, and (6) the beneficial results obtained. Blumberg v. Nealco, Inc., 307 S.C. 537, 538, 416 S.E.2d 211, 212 (Ct. App. 1992), *opinion modified on denial of reh'g* (Apr. 8, 1992), *aff'd as modified*, 310 S.C. 492, 427 S.E.2d 659 (1993). Guess Irrigation has provided evidence supporting each element, and therefore the requested award should be granted.

The Defendants devote a significant portion of their objection to Guess Irrigation's redaction of its invoices. The Defendants rely exclusively on a single federal appeals court opinion, Ideal Elec. Security Co. v. International Fidelity Ins. Co., 129 F.3d 143 (D.C. Ct. App. 1997), which has no precedential value in this case. The Defendants attempt to justify the holding in Ideal through their footnote, arguing why excluding any redacted bills is not extreme:

While this approach may at first appear extreme, it is not. Where an attorney knows early on in his or her representation that the client has a possibility of recovering attorney's fees, the attorney has an obligation to keep his or her time records in such a way to 1) clearly identify that the time entry relates to the cause of action for which fees may be recovered and 2) to describe the time entry without including privileged information. Where the attorney fails to do so, unredacted billing statements must be produced so that a determination can be made regarding whether the fees are recoverable.

Defendants' Objection at page 4. This argument proposes—and deems acceptable—a redaction occurring when the billing entry is made. What is the difference between redacting an entry when made, and redacting it now, as Guess Irrigation has done?

If a federal line of cases should be followed—Guess Irrigation does not necessarily agree it should—it stands to reason that the Fourth Circuit would be a more appropriate court to

consider. In Chaudhry v. Gallerizzo, 174 F.3d 394 (4th Cir. 1999), *cert. denied* 528 U.S. 891, U.S. (1999), the Fourth Circuit Court of Appeals observed that attorney-client privilege typically does not extend to billing records and expense reports. 174 F.3d at 402-03. However, the Chaudry court observed there was a distinction between discoverable information in billing records and privileged information those records may contain. The court quoted a Ninth Circuit Court of Appeals decision in Clarke v. American Commerce National Bank, 974 F.2d 127 (9th Cir.1992):

[T]he identity of the client, the amount of the fee, the identification of payment by case file name, and the general purpose of the work performed are usually not protected from disclosure by the attorney-client privilege. However, correspondence, bills, ledgers, statements, and time records which also reveal the motive of the client in seeking representation, litigation strategy, or the specific nature of the services provided, such as researching particular areas of law, fall within the privilege.

Id. at 129 (citations omitted). In Clarke, the Ninth Circuit concluded that the billing records were discoverable because of the general nature of the information provided therein, e.g., information on the identity of the client, the case name for which payment was made, and the amount of the fee. Id. at 130. The attorney's bills in Clarke, unlike those in Chaudhry, contained "nothing [that] ... reveal[ed] specific research or litigation strategy which would be entitled to protection from disclosure." Id. at 130; *see also* In re Grand Jury Proceedings, Thursday Special Grand Jury Sept. Term, 1991, 33 F.3d 342, at 354 (4th Cir. 1994) (intimating that the determination as to whether attorney billing statements are privileged hinges on whether the statements reveal something about the advice sought or given). In Chaudhry, the legal bills revealed the identity of the federal statutes researched. The court found that "[s]ince the records would divulge confidential information regarding legal advice, they constitute privileged

communications and, as such, should not be disclosed." Chaudhry v. Gallerizzo, 174 F.3d 394, 402-03.

The Defendants' primary focus appears to be on excluding time and expenses spent pursuing Guess Irrigation's claim under the South Carolina Unfair Trade Practices Act (SCUTPA), which was dismissed on summary judgment. However, the issues framed by that cause of action and its ensuing discovery are markedly similar to those in Guess Irrigation's claim for breach of the implied covenant of good faith and fair dealing, which survived as a component of Guess Irrigation's breach of contract claim. The Defendants were alleged to have engaged in these practices before, and there is the potential for repetition. The fact this evidence was relevant to both claims should not prevent Guess Irrigation from receiving an award for fees and litigation expenses to anything reasonably attributable to the breach of contract claim.

Guess Irrigation has produced evidence of fees, costs, and litigation expenses itemized in and supported by the Affidavits of Robert T. Strickland and Robert W. Buffington filed contemporaneously with the Plaintiff's Motion. These submissions contain information supporting all six factors to be considered in awarding attorney's fees and litigation expenses. Guess Irrigation even took the added step of providing unredacted copies of the statements to the court for an *in camera* inspection should the court determine further inquiry is necessary. The Defendants should not be allowed to extend the inquiry into reasonableness beyond the six factors outlined in Jackson by insisting on the production of privileged and confidential information. Adequate information has already been provided.

V. Additional Objections

1. Fees of Robert W. Buffington

2. Fees of Dan Shine
3. Expert Witness Fees

The Defendants' objections on these three issues will be addressed by a separate Memorandum submitted by Haynsworth Sinkler Boyd, P.A.

Pursuant to the above, Guess Irrigation respectfully reiterates its request for an award of \$415,751.50 in attorney's fees, \$79,183.04 in costs and litigation expenses, and \$51,027.04 in prejudgment interest, for a total award of Five Hundred Forty-five Thousand, Nine Hundred Sixty-one and 58/100 Dollars (\$545,961.58). This amount is in addition to the jury's verdict of \$144,016.00. Guess Irrigation further requests that the Defendants' demand to examine privileged and confidential information in its billing records be denied.

BARNES, ALFORD, STORK & JOHNSON, LLP

By:



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Attorneys for the Plaintiff

October 8, 2015

Columbia, South Carolina

CERTIFICATE OF SERVICE

I, Susan U. Jarrett, an employee of Barnes, Alford, Stork & Johnson, LLP, hereby state that on October 8, 2015, I served a copy of the within and foregoing **PLAINTIFF'S REPLY TO DEFENDANTS' OBJECTION TO MOTION FOR AWARD OF ATTORNEY'S FEES, COSTS, LITIGATION EXPENSES, AND INTEREST**, upon the parties to this action, through their attorneys of record, by depositing copies in the United States Mail, first class, sufficient postage prepaid, with the return address clearly noted, addressed as follows:

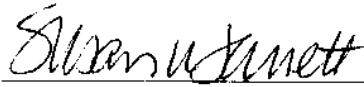
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I further certify that a copy was also provided to the Honorable Michael G. Nettles by depositing a copy in the United States Mail, first class, sufficient postage prepaid, with the return address clearly noted, addressed as follows:

The Honorable Michael G. Nettles
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Susan U. Jarrett

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